88-5223

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES OLDEN — PETITIONER

VS.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * *

The Petitioner, James Olden, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Kentucky without payment of costs and to proceed in forma pauperis pursuant to Rule 46.

Petitioner has been permitted by the Kentucky courts to proceed as an indigent at all stages of this action. The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Larry H. Marshall
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Supreme Court, U.S.
FILED
July 8, 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

JAMES OLDEN — PETITIONER

VS.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED
IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * *

I, James Olden, being first duly sworn, depose and say that I am the petitioner in the above-captioned case, that in support of my motion to proceed in forma pauperis without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security thereafter; and that, for the reasons stated in my petition for writ of certiorari, I believe I am entitled to redress.

I further swear that the information below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes (X) No ( )?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. $35.00 per month. State of Ky. Dept. of Corrections, Frankfort, Ky. 40601

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source? Yes ( ) No (X)

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings accounts? Yes ( ) No (X)

   a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? Yes ( ) No (X)

   a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for your support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

James Olden
JAMES OLDEN

Subscribed and sworn to before me by James Olden on this 5th day of July, 1988.

Frank B. Smithers
NOTARY PUBLIC, STATE AT LARGE

My commission expires: May 9, 1991

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES OLDEN PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

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July 8, 1988

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER, WHO IS BLACK, WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM BY THE EXCLUSION OF EVIDENCE INTENDED TO SHOW THAT A CRUCIAL WITNESS FOR THE PROSECUTION, WHO IS BLACK, WAS AT THE TIME OF HIS TESTIMONY LIVING WITH THE ALLEGED VICTIM, WHO IS WHITE, ON THE GROUND THAT THE EVIDENCE WOULD HAVE BEEN MORE PREJUDICIAL TO THE ALLEGED VICTIM THAN PROBATIVE FOR PETITIONER?

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PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM BY THE EXCLUSION OF EVIDENCE INTENDED TO SHOW THAT A CRUCIAL WITNESS FOR THE PROSECUTION, WHO IS BLACK, WAS AT THE TIME OF HIS TESTIMONY LIVING WITH THE ALLEGED VICTIM, WHO IS WHITE, ON THE GROUND THAT THE EVIDENCE WOULD HAVE BEEN MORE PREJUDICIAL TO THE ALLEGED VICTIM THAN PROBATIVE FOR PETITIONER.

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NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES OLDEN PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

The petitioner, James Olden, prays that a writ of certiorari issue to review the judgment of the Kentucky Court of Appeals decided on January 8, 1988.

OPINION BELOW

The opinion of the Kentucky Court of Appeals was rendered on January 8, 1988, and was ordered not to be published. Olden v. Commonwealth, Ky.App., File No. 86-CA-2607-MR (decided January 8, 1988). The Kentucky Court of Appeals overruled a petition for rehearing in a March 4, 1988, order. The Kentucky Supreme Court denied discretionary review on May 10, 1988, and the Court of Appeals entered the opinion as final on May 11, 1988. Copies of the opinion and orders are attached as a part of the appendix.

JURISDICTION

The opinion of the Kentucky Court of Appeals was rendered on January 8, 1988. A timely petition for rehearing was overruled on March 4, 1988. The Kentucky Supreme Court denied discretionary review on May 10, 1988, and the opinion became final the following day, May 11, 1988. The jurisdiction of this Court is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

> In all criminal prosecutions the accused shall enjoy the right ...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...

FOURTEENTH AMENDMENT

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

STATEMENT OF THE CASE

On February 6, 1986, the Caldwell County Grand Jury indicted Petitioner, James Olden, a black man, and Charles Ray Harris for acting individually or in complicity to engage in deviate sexual intercourse by forcible compulsion with Starla Matthews, a white woman, for unlawfully restraining her with the intent to accomplish a felony, and for engaging in sexual intercourse by forcible compulsion. These offenses were alleged to have occurred on December 25, 1985.

At trial Petitioner and Harris explained that they were at "J.R.'s," a "bootlegging joint" in Princeton, on Christmas evening of 1985. As Petitioner was leaving, Matthews stopped him and asked him to sit down. Shortly thereafter she asked him if he would like to have intercourse with her. Petitioner indicated he had been with Matthews sexually before. Petitioner suggested they go outside behind the bar and Matthews agreed. There they had both normal sexual intercourse and anal intercourse.

Matthews was apparently looking for cocaine while at the bar. So, after they had sex, she asked Petitioner to take her to a person's house and Petitioner asked Harris, who had a car, to take them there. Matthews got in the back of Harris' car and the group left. However, after reaching the house of the person who Matthews wanted to visit, it was discovered that he was not home.

During the ride Petitioner and Matthews had been "fooling around" in the back seat of the car. So, after finding her friend not to be home, Matthews directed Harris to drive to a dump so that she and Petitioner could have sex again. After this

act was accomplished Matthews asked Harris if he would like to have intercourse with her, but he could not get an erection.

They then proceeded back to "J.R.'s" but upon arriving saw the police. Harris left the vehicle to check out the situation and discovered that the woman who Matthews had been with at the bar, Regina Patton, had been in a wreck and had left the scene. Matthews said she was glad she wasn't with Patton because Matthews was on probation and Patton had just been released from jail.

Harris then drove to "Big O's," a store, for gasoline. At the store the group saw a police officer but there was no attempt by Matthews to summon his assistance.

The group then picked up Richard Hickey and Chris Taylor and went to an establishment called "The Alley." Petitioner and Matthews were left in the car. After Hickey and Harris returned to the car, they gave Hickey a ride to another location and let him out. Matthews then wanted to go see Bill Russell, Petitioner's half brother, but Petitioner and Harris refused to take her there because his wife would be at home, it being Christmas. Matthews therefore asked them to take her to her grandmother's home and Harris did so.

Chris Taylor and Richard Harris both testified at trial and verified Petitioner's and Harris' account of the evening, at least from the time they were given rides. Neither of them testified that Matthews appeared to be upset. Taylor even testified that at one point she seemed to be asleep. Hickey, who had seen Matthews earlier at "J.R.'s" testified that she had said then that she was "hot" and was looking for a black man with whom to have sex.

Adrian Gray verified that Petitioner, Harris, and Matthews were at "Big O's" to get gas and that a policeman was there. But even though Matthews was alert she did not signal the policeman for assistance.

Starla Matthews testified that she went to Princeton on Christmas day with Regina Patton to exchange gifts with Bill Russell, Petitioner's half brother. After Matthews and Patton met

Russell at a car wash and exchanged presents they decided to use the restroom nearby at "J.R.'s." While there Matthews acknowledged that she became intoxicated but also said that she became scared because the bar was becoming crowded and she and Patton were the only white people there. Nevertheless, Patton refused to leave so Matthews went to another table hoping to show Patton that she was upset. Matthews said she then lost track of Patton. Thereafter, she said Petitioner came up to her and told here that Patton had been in an accident. So she went with him across the street and got in the front seat c' Harris' car sitting between Harris and Petitioner.

At that time, Matthews said she saw the blue lights of a police car and became scared because she was on probation, had been drinking, and was with two black men. She had been released from jail on December 5. She, therefore, said she put her head in her lap and Petitioner covered it with a coat. However, Matthews said that when she tried to lift up Petitioner pushed her down and told her to get in the back seat. She said he then grabbed her hair, held a knife to her and told here that he'd kill her if she called the police.

Matthews said she then got in the back seat and while Harris held her arms Petitioner had intercourse and anal intercourse with her. She also said that Harris tried to force oral sodomy upon her.

Matthews said the group then went to a dump where two more men came. She said Petitioner raped her again. Afterwards she asked them to take her to Bill Russell's house and they took her to the area and let her out of the car. She then said that she saw Bill Russell and told him that she had been raped.

Major inconsistencies between Matthews' testimony and her previous statements were brought to light by the defense. In a statement to a detective immediately after the alleged incident Matthews said that when she left "J.R.'s" she was forced in the back seat of the car and told to lay down. She also said this in a second statement taken close in time to the alleged incident. However, at the preliminary hearing she stated that she

voluntarily got in the back seat of the car and at trial said she voluntarily got in the front seat.

Matthews also made a statement saying that she began to suspect something was wrong as soon as she was put in the car. Another statement was made that she knew something was wrong when her head was covered by the coat. But she testified at trial that she first knew something was wrong when Petitioner would not let her up.

Initially Matthews stated that four men raped her. This claim was made in statements to the police and at the hospital. Later, she told the police that she had been raped by two men and at the preliminary hearing stated that it was Petitioner and Harris who had done so. At trial she claimed only Petitioner raped her.

One of her statements also said that she had been threatened by Petitioner after she had been raped rather than before. She also stated at the preliminary hearing that Petitioner pulled her hair as she was taking off her clothes rather than before.

Matthews did not mention that Petitioner had a knife in the grand jury proceedings, during the preliminary hearing or in any statement made prior to trial, yet at trial she did. She specifically told the nurse at the hospital that no weapon was used.

Matthews also testified that she saw the blue lights of the police car after they had entered Harris' car and were pulling away whereas at the preliminary hearing she said that the police were noticed as soon as they came out of "J.R.'s" bar.

Matthews had abrasions on her knees and told the nurse at the hospital that she had received those abrasions when she was taken out of the car and raped. But at trial she testified that all intercourse occurred inside the car. She also told the nurse and the police that the incident occurred in only one place while at trial she testified that it occurred in two.

Matthews acknowledged that she had told two or three versions of the story and that she had even told two different versions on the night of the crime to the police and the hospital.

Matthews denied that she had intercourse with Petitioner anytime prior to the alleged incident but acknowledged that she had made a statement that she had prior to trial.

Emanual Tinsley and David Scott testified that they observed Petitioner, Harris and Matthews at "J.R.'s" socializing on Christmas evening. Both testified that Matthews has a bad reputation for truth and veracity. Matthews acknowledged that she was seeing a psychologist before the alleged incident.

Bill Russell, Petitioner's half-brother, with whom Petitioner said that he did not get along at all, testified in support of Matthews. Although Russell testified that he and Matthews were close friends and that at the time of trial he was separated from his wife, the defense was not allowed to show that at the time of trial Russell and Matthews were living together.

Russell acknowledged that he exchanged gifts with Matthews on Christmas day at the car wash. But he said that later that evening, between 9:00 and 10:00 p.m., he happened to be at the car wash again which is near "J.R.'s." At that time he said he saw Petitioner and Harris come out of the bar holding someone he thought to be Regina Patton. (On cross-examination he said he did not then realize that it was Matthews since she had on a coat different from the one she had been wearing earlier at the car wash, but Matthews did not testify that she had a different coat on at that time.)

Russell then went home but around 12:00 to 1:00 a.m. heard a noise outside. When he looked down the street he saw Matthews get out of Harris' car. Russell went to Matthews and was told that she had been raped by Harris and Petitioner, identifying them by name.

Russell's testimony contradicted the testimony of Detective Mark Haberlock who stated that when he initially interviewed Matthews she could only identify Petitioner by name and had to identify Harris from pictures. Russell's statement

that he saw Matthews, Petitioner and Harris exit "J.R.'s" also contradicted a statement he made to Detective Haberlock which did not mention this occurrence.

Based on the aforementioned evidence the jury determined that Petitioner's codefendant, Charles Harris, was guilty of nothing. He was acquitted of being either a principal or an accomplice to the charges of rape, sodomy, and kidnapping. Petitioner, likewise, was acquitted of kidnapping and raping Starla Matthews, however, the jury inconsistently found him guilty of sodomy and fixed his sentence at ten (10) years in prison.

A final judgment in accordance with this verdict was entered on June 5, 1986. A second judgment was entered on October 31, 1986, after the first judgment was vacated. On January 8, 1988, the Court of Appeals affirmed Petitioner's conviction in a 2-1 decision and a Petition for Rehearing, filed by Petitioner, was denied on March 4, 1988. The Kentucky Supreme Court denied discretionary review on May 10, 1988, and the Kentucky Court of Appeals entered the opinion as final the following day, May 11, 1988.

REASON FOR GRANTING WRIT

PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM BY THE EXCLUSION OF EVIDENCE INTENDED TO SHOW THAT A CRUCIAL WITNESS FOR THE PROSECUTION, WHO IS BLACK, WAS AT THE TIME OF HIS TESTIMONY LIVING WITH THE ALLEGED VICTIM, WHO IS WHITE, ON THE GROUND THAT THE EVIDENCE WOULD HAVE BEEN MORE PREJUDICIAL TO THE ALLEGED VICTIM THAN PROBATIVE FOR PETITIONER.

Petitioner is black. Starla Matthews, the alleged victim of the charged rape, kidnapping and sodomy by Petitioner, is white. She testified that she went to Princeton on December 25, 1985, to exchange presents with Bill Russell, Petitioner's half-brother, who is black. Matthews met Russell at a car wash and the exchange of gifts was completed. Although Russell was married to another woman at that time, he was separated by the time of trial and was living with Matthews. However, the

testimony admitted let the jury know only that Russell and Matthews were friends.

The jury was not apprised of the living arrangements of Russell and Matthews because during Matthews' testimony the trial court granted the prosecutor's motion in limine to prevent the defense from showing this fact. The court ruled in this manner despite an argument that the charges Matthews was making against Petitioner were fabricated in an attempt not to ruin her relationship with Russell. This relationship clearly provided Matthews an interest in denying that she had consensual sexual relations with Petitioner with whom Russell did not get along "at all." Codefendant's counsel stated specifically that this was the "theory of the case." It must also be noted that Matthews claimed she was living with her mother.

Bill Russell's testimony against Petitioner was extremely significant. He testified for the prosecution that he saw Matthews leave a bar with Petitioner and his codefendant virtually carrying her to the codefendant's car. He also testified that when he later saw Matthews that night leaving the codefendant's car she immediately claimed that she had been raped and identified Petitioner and the codefendant as her assailants.

Accordingly, evidence that Russell and Matthews were living together at the time of trial was relevant not only to establish Petitioner's theory of the case -- that Matthews fabricated the charges against Petitioner in an attempt not to jeopardize her relationship with Russell, but also that Russell had a reason to lie on behalf of Matthews in his testimony against Petitioner. Ultimately, the evidence had value both for impeachment and substantive purposes.

Petitioner had a fundamental constitutional right under the Sixth and Fourteenth Amendments to the U. S. Constitution to present evidence relating to his theory of defense. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Even the Kentucky Court of Appeals acknowledged that the

aforementioned evidence was relevant to Petitioner's theory of the case.[1]

Furthermore, the Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This Court has emphasized on numerous occasions that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Further, this Court has stated that cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965).

More specifically, this Court has stated that the opportunity for cross-examination "is critical for ensuring the integrity of the fact finding process." Kentucky v. Stincer, ___ U.S. ___, 107 S.Ct. 2658, 2662, 96 L.Ed.2d 631 (1987). Indeed, cross-examination is "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). It is clear that this constitutional principle encompasses the right to cross-examine a witness to show a bias or motive to lie. Davis v. Alaska, supra; California v. Green, 399 U.S. 149, 161, 90 S.Ct. 1930, 1936, 26 L.Ed.2d 489 (1970).

The Kentucky Court of Appeals' conclusion that the evidence of Matthews' and Russell's cohabitation was not admissible is disturbing. The Court of Appeals held that the trial court did not err because "Matthews was white and Russell was black," and "[f]or the trial court to have admitted into

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[1] It is clear that the evidence which Petitioner sought to admit did not fall under the restrictions of KRS 510.145, Kentucky's "Rape Shield Law." At trial, in the briefs on appeal and at oral argument, Petitioner has always asserted that evidence that Russell and Matthews were living together was not evidence of prior sexual conduct or reputation. (Indeed, it really does not matter for purposes of this issue if Matthews and Russell actually had a sexual relationship.) Accordingly, the Court of Appeals was at least correct in concluding that KRS 510.145 does not apply to this situation and therefore could not be used to exclude this evidence.

evidence testimony that Matthews and Russell were living together as of the time of the trial may have created extreme prejudice against Matthews." Accordingly, it was held that the probative value of the evidence, despite being relevant to Petitioner's theory for the case, was outweighed by its possibility for prejudice to the alleged victim. Obviously, due to the aforementioned principles concerning the rights to present a defense and of confrontation and cross-examination, if Matthews and Russell had both been of the same race the evidence that they lived together would clearly have been admissible.[2] Their racial difference, therefore, should have been of no concern to the Court of Appeals.

Furthermore, there can be no doubt that in a criminal prosecution, a defendant has the right to a trial by an impartial and unbiased jury. This right is also guaranteed by the Sixth Amendment to the United States Constitution. In this regard a defendant in a criminal case involving an interracial crime is always entitled to a jury which will not take race into account in its deliberations concerning the case. See Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). Therefore, in the case at bar Petitioner had the right to be tried by a jury which was totally blind to any distinctions between the races and harbored no racial prejudice.

But, if the Court of Appeals' conclusion is correct -- that Starla Matthews, a white, would have been prejudiced in the eyes of the jury for living with a black man -- the opinion is clearly an implicit recognition that Petitioner was tried by a jury which was not oblivious to these impermissible distinctions and prejudices. It is obvious that the Court of Appeals, in essence, found that there is no possibility that Petitioner could have received a fair trial from an impartial jury since, after all, he was a black man charged with forcible sexual offenses against a white woman. If the Court of Appeals' decision

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[2] This is also apparently true under Kentucky law. See Parsley v. Commonwealth, Ky., 306 S.W.2d 284 (1957) (holding that the right to show interest by reason of marital relation is unquestioned and extending this principle even to engagements to be married).

concerning the inadmissibility of evidence is upheld then Petitioner's conviction must be reversed because of this denial of a fundamental constitutional right. It is certainly not an acceptable resolution of the issue to prevent an implicitly acknowledged racially biased jury from being prejudiced against the victim while allowing it for similar reasons to be prejudiced against the defendant.

Actually, the record in the case at bar shows that the Court of Appeals' conclusion that the jury would have been prejudiced against Matthews upon learning that she lived with a black man is not supported factually. During voir dire the Commonwealth Attorney specifically questioned the jurors concerning their attitudes toward race.

> As you see, the two defendants in this case are black. The alleged victim in this case is white. I'm going to ask each and every one of you to make a commitment at this time both for the defendants and for the Commonwealth. All of you would agree with me that the defendants because they're black and the victim because she is white should play no part in this trial. All of you agree with that? That you will make a determination in this case on guilt or innocence based as if all skin color was the same. Will all of you make that commitment to both sides? That race has no part in this case. All of you agree to that? (Emphasis added.)

No juror indicated at that time that race would play any part in their deliberations. The jury was also questioned further concerning this matter by the Commonwealth Attorney during voir dire and once again no one indicated that race would be a consideration. Obviously, if the jury indicated that race would play no part in the case for either side the Court of Appeals' conclusion that the jury would have been prejudiced against Matthews by learning that she lived with Russell has no basis.

The prejudice to Petitioner by preventing him from presenting evidence to confront his accuser and another witness against him, however, is clear. In Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986), this Court

rejected an "outcome determinative" test for evaluating prejudice for a denial of the right to confrontation.

> While some constitutional claims by their nature require showing of prejudice with respect to the trial as a whole, see e.g., Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ...could appropriately draw inferences relating to the reliability of the witnesses." Davis v. Alaska, 415 U.S. at 318, 94 S.Ct. at 1111.

Obviously, in the case at bar, as in Delaware v. Van Arsdall, supra, the jury "might have received a significantly different impression" concerning the credibility of Bill Russell if Petitioner's counsel had been allowed to show that Russell and the alleged victim were cohabitating at the time of trial. Id.

It must be remembered, too, that this inquiry would not only have been appropriate for cross-examination for impeachment purposes. Evidence of the relationship between Russell and Matthews was extremely important to establish a motive for Matthews to have brought the charges in the first place. The prejudice here is therefore more than just the denial of the right to cross-examine, but also the denial of Petitioner's right to present evidence going directly to his theory of the case.

Accordingly, there is no possibility that the exclusion of this line of questioning and evidence was harmless beyond a

reasonable doubt under the test established in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Bill Russell's testimony was obviously crucial since it corroborated Matthews' assertion that Petitioner forced her to perform sexual acts since Russell stated that Matthews made an excited utterance accusing Petitioner when she exited from his car. Russell's testimony also corroborated Matthew's assertion that she was forcibly abducted. No other witnesses testified to these facts aside from Matthews herself. There were contradictions of major proportions in Matthews' testimony and in Russell's testimony as well. Certainly, it is apparent from the Statement of the Case (as illustrated by the verdicts of the jury) that the overall strength of the prosecution's case was weak. All of these factors must be considered in determining whether the denial of the right to confront was harmless. See Delaware v. Van Arsdall, supra, 106 S.Ct. at 1438.

Finally, the Kentucky Court of Appeals applied the test of weighing probative value against possible prejudice in a way which is unprecedented in previous criminal cases within this Commonwealth. Generally, that test is used to determine whether the probative value of the intended evidence for the prosecution is outweighed by the possibility of prejudice to the defendant by improperly influencing the jury's decision concerning guilt or innocence. See O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153, 156 (1982); Wonn v. Commonwealth, Ky.App., 306 S.W.2d 169, 171 (1980). The possibility of prejudice to an alleged victim has simply not been a consideration in this test previously. Actually, an alleged victim is not a party in a criminal case but a witness to an alleged offense against the state. Accordingly, the constitutional right of a defendant to a fair trial and to due process of law through confrontation under the Sixth and Fourteenth Amendment to the United States Constitution must take priority over a concern for any embarrassment or humiliation the alleged victim might be subjected to, particularly when the evidence in question is clearly relevant and has high probative value for the defendant's defense to the charges against him. Certainly, the

prevention of any embarrassment or humiliation that a victim might suffer from evidence of an interracial relationship does not further any "legitimate" or "important public policy" that would require the fundamental right to confrontation to bow to accommodate this interest. See Coy v. Iowa, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 43 CrL 3226 (decided June 29, 1988); Chambers v. Mississippi, supra, 410 U.S. at 295.

Even if the test of weighing prejudice against probative value would allow a consideration of any possible prejudice to the alleged victim as a witness for the prosecution an exclusion of evidence or a particular line of questioning intended for confrontation should be constitutionally permissible only if the evidence has slight probative value for the defense and there is a danger of unfair prejudice. See Federal Rule of Evidence, FRE 403. Obviously, the purpose of confronting witnesses for bias or introducing evidence to call into question the legitimacy of the charges against the defendant is an attempt to prejudice or harm the cause of the prosecution. Such is the nature of the adversarial system of justice. See Louisell and Mueller, Federal Evidence, Vol. 2, §126 (1985); United States v. Betancourt, 734 F.2d 750, 757 (11th Cir. 1984) reh. den. 740 F.2d 979 (11th Cir. 1984), cert.den. 469 U.S. 1021, 105 S.Ct. 440, 83 L.Ed.2d 365, and 469 U.S. 1076, 105 S.Ct. 574, 83 L.Ed.2d 365 (1985) (in criminal cases "relevant evidence is inherently prejudicial," but FRE 403 authorizes exclusion "only when unfair prejudice substantially outweighs probative value.") "[S]ometimes...the behavior charged to ...a victim...may be unpleasant to contemplate. [But] [e]vidence which tends fairly and directly to depict such behavior and its result does not raise the risk of "unfair prejudice" ...merely because believing the evidence raises doubt about...character or diminishes...standing or reputation in the community." Louisell and Mueller, supra.

CONCLUSION

In the case at bar the cross-examination and evidence proposed by the defense to show that Starla Matthews and her primary witness Bill Russell lived together at the time of trial

was plainly not intended simply to reflect on the character of either Russell or Matthews. Instead, the evidence was highly relevant to Petitioner's theory of the case that Matthews fabricated the charges against him to protect her relationship with his half-brother since Petitioner asserted that he had voluntary sexual relations with Matthews and to show that Russell, due to his close relationship with Matthews, had a reason to testify in a certain manner on Matthews' behalf. As such, Petitioner had a right under the Sixth and Fourteenth Amendments to present this evidence and to confront the witnesses about these facts. The Kentucky Court of Appeals' holding condoning the exclusion of this evidence by the trial court simply cannot pass constitutional muster and must be found to have denied Petitioner a fair trial in accordance with the requirements of due process. Because of the extremely fundamental nature of the rights involved this Court should grant certiorari.

Respectfully submitted,

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE

COUNSEL FOR PETITIONER

RANDALL L. WHEELER
ASSISTANT PUBLIC ADVOCATE

OF COUNSEL

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES OLDEN
Petitioner

COMMONWEALTH OF KENTUCKY
Respondent

The Clerk will enter our appearance as Counsel for the Petitioner.

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The Clerk is requested to notify counsel of action of the Court by means of:

Regular Mail

OPINION RENDERED: January 8, 1988; 10:00 A.M.
NOT TO BE PUBLISHED

ENTERED

MAR 13 1988

MARTHA McCALISTER, CLERK
By C. Creel Brown D.C.

Commonwealth Of Kentucky

Court Of Appeals

FINAL

NO. 86-CA-2607-MR

DATE MAY 11 1989

JAMES OLDEN — APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT
HON. WILLARD B. PAXTON, JUDGE
ACTION NO. 86-CR-006

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING

* * * * * * * * *

BEFORE: CLAYTON, COOPER, AND LESTER, JUDGES.

COOPER, JUDGE. This is an appeal from a judgment convicting the appellant, James Olden, of first-degree sodomy and sentencing him to ten years' imprisonment. On appeal, the principal issue is whether the appellant was denied his constitutional right to present a defense as a result of the trial court's exclusion of evidence relating to the sexual habits of the prosecuting witness. Reviewing the record below, we affirm.

Without reciting all of the sordid facts involving this action, the essential facts are as follows: in February of 1986 the Caldwell County Grand Jury indicted the appellant along with Charles Ray Harris both individually, or in complicity, for the

following felonies: engaging in deviant sexual intercourse by forceable compulsion with Starla Matthews; unlawfully restraining Matthews with the intent to commit a felony; and engaging in forceable sexual intercourse with Matthews. Such offenses were alleged to have occurred on Christmas day, 1985 at or near a "bootlegging joint," J.R.'s, in Princeton, Kentucky. Although the complaining witness, Starla Matthews, alleged that she was forceably raped and sodomized as well as kidnapped, the appellant's defense was one of consent.

Subsequent to the presentation of all the evidence, Charles Harris was acquitted of all counts either as a principal or as an accomplice. The appellant was acquitted of the kidnapping and rape counts of the indictment, but was found guilty of sodomy and sentenced to ten years' imprisonment. It is from such judgment that he now appeals.

On appeal, the appellant argues that he was denied the right to a fair and impartial trial as a result of the trial court's refusal to admit into evidence testimony relating to the sexual habits or living arrangements of Matthews. The context in which such testimony was offered was as follows: Starla Matthews testified that she went to Princeton on December 25th to exchange Christmas presents with one Bill Russell. Russell was the appellant's half-brother and he apparently did not get along with him. On December 25, 1985, Russell was married to another woman. Nevertheless, by the time of the trial, Russell had separated from his wife and was apparently living with Matthews.

The fact that he was living with Matthews was never brought before the jury.

The thrust of the appellant's argument is that this fact - the living arrangement between Russell and Matthews - was crucial in the presentation of his defense. Specifically, he argues that given his poor relationship with Russell, the alleged victim, Starla Matthews, fabricated a story of rape in order not to "get in trouble with Russell." Stated simply, he argues that Matthews fabricated the whole story of rape, kidnapping and sodomy in order to convince Russell that she had not been a willing participant in sexual activity with him. Furthermore, he argues that he sought to introduce evidence which only related to the "living arrangement" between the complaining witness and Russell, and not evidence of any specific sexual conduct or habits on her part. And, he argues that such evidence would have been for impeachment purposes only and not as substantive evidence.

Under the language of KRS 510.145, evidence of the complaining witness prior sexual conduct or habits with the defendant or evidence pertaining to the act on which the prosecution is based may be admitted into evidence if the trial court determines that such evidence is relevant and its probative value outweighs its inflammatory or prejudicial nature. KRS 510.145(3)(a),(b). The statute does not address the issue of the potential admissibility of the complaining witness' prior sexual conduct or habits with someone other than the defendant upon a showing of relevancy. KRS 510.145(2). Although it is unclear

from the record, it is apparent that although Matthews and Russell were not living together as of December 25, 1985, they had had some type of sexual relationship prior to that time. If such is the case, testimony relating to that relationship would have been inadmissible under KRS 510.145(2).

Assuming, for the sake of argument, that the appellant only sought to introduce evidence of Matthews' living arrangement with Russell as of the time of the trial, the language and prohibitions set forth in the statute would be inapplicable in that the statute is concerned only with the exclusion of reputation evidence or prior conduct.

Nevertheless, we cannot say that the trial court's ruling in this respect was in error. There was testimony that Matthews and Russell were "close friends" and had exchanged Christmas presents; there was testimony that Russell and the appellant "did not get along," and there were the undisputed facts of race: Matthews was white and Russell was black. For the trial court to have admitted into evidence testimony that Matthews and Russell were living together as of the time of the trial may have created extreme prejudice against Matthews. Consequently, on a pure evidentiary basis, the testimony, although relevant to the appellant's theory of the case, had its probative value outweighed by its possibility for prejudice. The trial court's ruling, even if based on an incorrect application of the statute, was correct.

Finally, we cannot say that the trial court erred in refusing to hold a hearing with respect to the potential bias on

the part of a juror. Although the appellant argues that such a refusal constitutes reversible error, we cannot say from a review of the record below as well as the allegations set forth by the appellant that it was clear abuse of discretion on the part of the trial court to refuse to hold such a hearing. And, although the appellant argues that the appellant's conviction must be reversed in that it reflects an inconsistency on the part of the jury, such issue was admittedly not preserved for appellate review. Consequently, this Court will not address it.

The judgment of the trial court is affirmed.

LESTER, J., CONCURS.

CLAYTON, J., DISSENTS.

I respectfully dissent from the opinion of my colleagues. There are two reasons. First, the verdicts of the jury are manifestly inconsistent. Second, the testimony of the prosecuting witness is patently unbelievable and therefore does not provide evidence sufficient to uphold a conviction.

The appellant was charged with kidnapping, rape and sodomy. The sodomy offense was based on an act of anal intercourse. A co-defendant was charged with complicity. The appellant's defense was that the prosecuting witness willingly accompanied him and his companion and that the acts of intercourse occurred, but were consensual in all respects. The prosecuting witness contended that all acts were committed by force or threat of force.

Although the prosecuting witness testified that the co-defendant assisted the appellant in the abduction and was present during the forceably compelled sexual acts and even attempted to engage her in an act of oral sex, the jury acquitted the co-defendant of all charges. The appellant was acquitted of the charge of kidnapping and rape, but was convicted on the sodomy charge.

The inconsistency of the verdicts is obvious. If the prosecuting witness is to be believed, then the appellant is guilty in all respects and is guilty of each and every charge. Further, the co-defendant should have been found guilty of being an accomplice in the kidnapping charge at the very least. If the appellant is to be believed, then all acts were consensual. It has to be one way or the other.

It is true that there is objective evidence that the act of sodomy occurred since a physician testified that he treated the prosecuting witness for a tear in her rectum. However, this evidence should have no real probative effect since all of the parties admit that each sexual act actually took place. The only disagreement is to whether or not all of them were forceable acts or all of them were consensual acts. There is no middle ground in the testimony.

The unbelievability of the prosecuting witness' testimony is the second basis for reversal. It goes without saying that it is a well-established rule that it is the peculiar province of the jury to determine the credibility of witnesses and to assess the weight given to their testimony to the extent

that in most cases the jury may believe one witness even though he is contradicted by others, or may believe one set of witnesses to the exclusion of another set. However, in cases of this nature our courts have recognized some distinction. Carrier v. Commonwealth, Ky., 356 S.W.2d 752 (1962); Kearney v. Commonwealth, Ky., 386 S.W.2d 953 (1965). In particular, convictions of this nature are to be reviewed with particular scrutiny. Carrier, supra; Kearney, supra. In order to sustain a conviction of this nature Kentucky case law requires that the testimony of the prosecutrix be credible, probable, and not at variance with the laws of the common experience. Clements v. Commonwealth, Ky., 424 S.W.2d 825 (1968); Carmichael v. Commonwealth, Ky., 452 S.W.2d 378 (1970). The reason for the policy in cases of this nature is that the charge is so easily made and so difficult to disprove, and when combined with the natural indignation so often created by the charge itself, jurors are often adversely affected and therefore great care is required in appellate review. Holland v. Commonwealth, Ky., 272 S.W.2d 458 (1954); Carrier, supra.

The prosecuting witness' statements at various stages of this proceeding are full of glaring inconsistencies. She initially claimed to have been raped by four men. That number was then changed to two, and at trial she only claimed that one had actually raped her. In addition, she changed her story about whether she had engaged in prior consensual intercourse with the appellant. Further, an examination of her testimony about the

facts and circumstances surrounding these sexual acts reveal numerous contradictory inconsistent statements on her part.

Regardless of her own vacillating testimony, there is evidence in the record from an objective witness that indicated that at a point subsequent to her alleged abduction, she, the appellant and the co-defendant were all at a gas station with a police officer present, and that the prosecuting witness made no cry for help or attempt to escape although an opportunity presented itself. If the actions of the prosecutrix before and after the time of the alleged offense are such as indicate when considered in the light of ordinary rules of behavior that the event did not happen as testified then the uncorroborated testimony of the prosecutrix is not sufficient. Carrier, supra.

The facts in this case are extremely similar to those in Carrier v. Commonwealth, supra; Kearney v. Commonwealth, supra and Carmichael v. Commonwealth, supra. In each of those cases the Kentucky Supreme Court (then the Court of Appeals) required a reversal. This Court is compelled to follow the precedence established by the Supreme Court and its predecessor. RSC 1.030(8)(a). It is clear from the evidence that the probative value of the prosecuting witness' testimony is destroyed, not just by her consistently inconsistent statements, but by her conduct as well.

I would reverse without reservation.

Commonwealth Of Kentucky

Court Of Appeals

NO. 86-CA-2607-MR

JAMES OLDEN — APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE WILLARD B. PAXTON, JUDGE
ACTION NO. 86-CR-006

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

BEFORE: CLAYTON, COOPER and LESTER, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: MAR 4 1988

JUDGE, COURT OF APPEALS

Supreme Court of Kentucky

88-SC-000211-D
(86-CA-002607-MR)

JAMES OLDEN — MOVANT

V.

CALDWELL CIRCUIT COURT
#86-CR-000006

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED May 10, 1988.

Robert F. Stephens

Chief Justice